Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSEPH CAMMARANO,

Petitioner,

v.

MICHAEL W. MOORE, Secretary, Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I.

WHERE THERE IS NO EVIDENCE THAT THE STATE COURT MET ITS OBLIGATION TO APPLY THE HARMLESS BEYOND A REASONABLE DOUBT STANDARD OF *CHAPMAN v. CALIFORNIA* IN A STATE PRISONER'S DIRECT APPEAL, DOES THE HARMLESS ERROR STANDARD OF *CHAPMAN*, RATHER THAN *BRECHT v. ABRAHAMSON*, APPLY TO THE PRISONER'S FEDERAL HABEAS CORPUS ACTION?

II.

CAN ERROR BE FOUND HARMLESS UNDER *BRECHT v. ABRAHAMSON* BY ISOLATING THE PROSECUTION'S CASE WITHOUT ANY REGARD TO THE DEFENSE?

III.

IS A VIOLATION OF *EDWARDS v. ARIZONA* HARMLESS *PER SE* UNDER *HARRIS v. NEW YORK*?

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The opinion of the court of appeals is reproduced in the Appendix filed herewith ("App.") at App. 1. The opinion of the district court appears at App. 2-27.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the unpublished decision of the United States Court of Appeals for the Eleventh Circuit which was entered on April 27, 2000. (App. 1). A timely filed application for extension of time within which to file a petition for writ of certiorari was granted to August 28, 2000. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 in relevant part provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) that there is either an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On May 24, 1984, Dennis Potenzo shot and killed two employees of a lounge in Orlando, Florida, in the course of a robbery. After the shooting, Potenzo was observed walking near the lounge with the petitioner. A police officer approached them. Potenzo was carrying a towel. The petitioner was carrying a bag in which the officer observed money. Potenzo dropped the towel and fled. The officer lifted the towel and saw a gun under it. The petitioner was arrested and charged with felony murder. Potenzo was later arrested and charged with the murders. (App. 2-3,).

Prior to trial, the petitioner moved to suppress statements obtained from him based upon *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which held that a criminal defendant's rights are violated by the use of a confession obtained by police-instigated interrogation, without counsel present, after an attorney has been requested. At an evidentiary hearing on the motion to suppress, the two interrogating officers acknowledged that the petitioner had asked whether his attorney, William Sheaffer, could be present during the ensuing interrogations. The officers did not honor the request, continued to interrogate the petitioner, and obtained the statements in question. The state trial judge denied the pretrial motion to suppress without any findings. (App. 3-5, 44-46).

The petitioner retained Sheaffer to represent him. The State moved to disqualify Sheaffer on the ground that he was being investigated by the same prosecutor who was prosecuting the petitioner and that Sheaffer could be a witness at the petitioner's trial. The prosecutor's investigation was based upon an allegation that Sheaffer was involved in bribing a prosecution witness in the petitioner's case. At a hearing on the motion to disqualify, the prosecutor informed the trial judge that Sheaffer was facing indictment. The state trial judge conducted no inquiry into any conflict of interest arising from Sheaffer's representation of the petitioner against the same

prosecutor who was investigating Sheaffer. The prosecutor's motion to disqualify was denied. (App. 5-6, 46-48).

Approximately ten days before the motion for disqualification of Sheaffer was filed, Hinton Waters, a Florida inmate, wrote a letter to the jail chaplain. Waters related that he was told by Potenzo that he committed the robbery and murders without the petitioner's knowledge and that Potenzo stated he would implicate the petitioner to save himself from the electric chair. (App.11, 47-48).

Not long after he received the letter from Waters, the chaplain contacted Sheaffer and showed him the letter. Sheaffer took the letter but the chaplain later testified that Sheaffer appeared disinterested. (App.48). Waters was never contacted by Sheaffer concerning the contents of the letter and Sheaffer did not call Waters as a witness at the petitioner's trial. (App.48).

Potenzo pled guilty to the murders and pursuant to a plea agreement to avoid the death penalty testified against the petitioner. Potenzo testified that the petitioner participated in the robbery. The petitioner testified and denied any prior knowledge of or participation in Potenzo's crimes. The petitioner testified that he was doing plumbing work at the lounge and presented witnesses and documentary evidence to support his employment by the lounge. (App. 6-9). Thus, the jurors were faced with a credibility choice between Potenzo and the petitioner. The State relied heavily upon the challenged statements obtained from the petitioner. The jury found the petitioner guilty as charged. (App. 7, 9, 51).

The petitioner appealed and based upon *Edwards* challenged the state court's denial of his motion to suppress the statements taken after he requested counsel. (App. 9). The state appellate court affirmed without an opinion. *Cammarano v. State*, 494 So. 2d 219 (Fla.5th DCA 1986).

The petitioner filed for post-conviction relief in the state trial court and alleged that Sheaffer afforded him ineffective assistance of counsel. (App. 9). Citing the Sixth Amendment, the petitioner pointed to specific deficiencies by Sheaffer,

including his failure to interview Waters or call him to testify that Potenzo told him he was falsely implicating the petitioner in order to avoid the death penalty. The petitioner specifically claimed that Sheaffer's ineffectiveness was due in part to the investigation by the prosecutor that was hanging over his head during the petitioner's prosecution. (App.52).

An evidentiary hearing was held. Waters testified that he wrote a letter to the jail chaplain stating that while he and Potenzo were incarcerated together, Potenzo stated that the petitioner did not participate in the murders or the robbery. (App. 11, 54). Waters stated that he was never contacted by Sheaffer or an investigator. (App. 11, 54). Waters testified that he would have testified at the petitioner's trial. (App. 11, 54).

Sheaffer testified with regard to the prosecutor's investigation of him as follows: "I was concerned about the effect of the investigation on two fronts, one my immediate representation [of the petitioner], and two, my future career as a criminal defense attorney in Orange County. You might as well take my license if you take my reputation." (App. 55).

Sheaffer claimed that he made a tactical decision not to present Waters as a defense witness based upon consultation with two attorneys familiar with Waters and instead presented another witness on the subject. Sheaffer claimed he could not recall the attorneys' names. The judge ordered Sheaffer to recall their names following a recess. After the recess, Sheaffer named two attorneys. The state judge denied relief. Thereafter, the petitioner contacted the two attorneys and moved for rehearing to present their testimony. The two attorneys testified at the rehearing and refuted Sheaffer's testimony. (App. 15, 56). Post-conviction relief was again denied by the state trial judge. (App. 14, 57). The intermediate appellate court affirmed, *Cammarano v. State*, 548 So. 2d 671 (Fla.5th DCA 1989), and the state supreme court denied review. *Cammarano v. State*, 551 So. 2d 460 (Fla.1989).

The petitioner filed a second request for post-conviction relief based upon an affidavit executed by Potenzo in which he recanted his testimony at the petitioner's trial. (App. 16, 57). At

an evidentiary hearing, Potenzo refused to testify and the recantation was ruled inadmissible. (App. 16-17). The judge also ruled inadmissible testimony from Waters. (App. 59). Post-conviction relief was denied and the appellate court affirmed. (App. 17).

The petitioner sought habeas corpus relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Middle District of Florida. On September 2, 1998, the district judge entered a written order denying relief without an evidentiary hearing. (App. 2-27). Relying upon *Bergman v. Duncan*, 86 F.3d 1161 (9th Cir.1996) [unpublished], the district judge found that the petitioner failed to exhaust his Sixth Amendment claim of ineffective assistance of counsel on the ground that a claim of a violation of the right to conflict-free counsel must be raised separately from a claim of a violation of the Sixth Amendment right to effective assistance of counsel. (App. 17-29).

With regard to the *Edwards* claim, the district judge held, in pertinent part, that assuming there was constitutional error, it was harmless for two reasons: first, under the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the error did not have a "substantial and injurious effect or influence in determining the verdict" (App. 24); and second, under *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the unconstitutionally obtained statements could still be used to impeach the petitioner if he testified. (App. 25).

The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed "on the basis on [sic] the district court's well-reasoned Order dated September 2, 1998." (App. 1).

ARGUMENT

I.

WHERE THERE IS NO EVIDENCE THAT THE STATE COURT MET ITS OBLIGATION TO APPLY THE HARMLESS BEYOND A REASONABLE DOUBT STANDARD OF *CHAPMAN v. CALIFORNIA* IN A STATE PRISONER'S DIRECT APPEAL, THE HARMLESS ERROR STANDARD OF *CHAPMAN*, RATHER THAN *BRECHT v. ABRAHAMSON*, APPLIES TO THE PRISONER'S FEDERAL HABEAS CORPUS ACTION.

At the petitioner's state trial, the State introduced into evidence statements obtained from the petitioner after his request for counsel was ignored by the police thereby violating *Edwards v. Arizona*, 451 U.S. at 484-85 ("[H]aving expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."). After exhausting the *Edwards* issue in the state courts, the petitioner sought federal habeas corpus relief. The constitutional error in admitting the statements was a trial error and therefore subject to harmless error review. See *Arizona v. Fulminante*, 499 U.S. 279, 306-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The district judge, assuming that *Edwards* was violated, found the admission of the statements to constitute harmless error under this Court's decision in *Brecht v. Abrahamson*, *supra*.

In *Brecht*, a state prisoner sought federal habeas corpus relief because the State violated due process under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) which prohibits references to an accused's post-*Miranda* silence. The State Supreme Court found that the error was "harmless beyond a reasonable doubt" under the standard set

forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The federal district court set aside the conviction and the Seventh Circuit reversed. This Court granted review to determine whether the *Chapman* harmless-error standard applies in determining whether the prosecution's violation of *Doyle* warrants federal habeas corpus relief. This Court held in *Brecht* that it does not and that the appropriate standard is the harmless error standard from *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 1248, 90 L.Ed.2d 1557 (1946), which asks whether the error "had substantial and injurious effect or influence in determining the jury's verdict." In so deciding, this Court noted that the *Chapman* standard, which the petitioner urged, applies to direct and not collateral review. However, the decision in *Brecht* assumed that the state courts would meet their obligation to apply the *Chapman* standard in direct appeals from denials of constitutional errors. This Court reasoned as follows:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. [citation omitted] For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Brecht, 507 U.S. at 636, 113 S.Ct. at 1721. In the case at bar, there is no indication that the state courts applied *Chapman.*

In the wake of *Brecht*, the following question arose: Does the *Brecht/Kotteakos* harmless error standard still apply in a case where there is no evidence that the state courts met their obligation to apply the *Chapman* standard? The Eighth Circuit answered the question in the negative. See *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir.1993). The other

circuits that have weighed in on the issue have responded in the affirmative. See, *e.g.*, *Sherman v. Smith*, 89 F.3d 1134, 1141 (4th Cir.1996); *Gilliam v. Mitchell*, 179 F.3d 990, 994-95 (6th Cir.1999); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir.1995); *Bains v. Cambra*, 204 F.3d 964 (9th Cir.2000); *Davis v. Executive Director of Dep't of Corrections*, 100 F.3d 750, 772 n.20 (10th Cir.1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir.1995). In the case at bar, consistent with the binding precedent of the Eleventh Circuit in *Horsley*, the district judge applied the *Brecht* standard. The Eleventh Circuit affirmed.

The petitioner requests that this Court grant review to resolve the conflict among the circuits.

II.

ERROR CANNOT BE FOUND HARMLESS UNDER *BRECHT v. ABRAHAMSON* BY ISOLATING THE PROSECUTION'S CASE WITHOUT ANY REGARD TO THE DEFENSE.

Even if *Brecht* supplies the appropriate harmless error standard in the case at bar, review is sought because that standard was improperly applied. The district judge found the *Edwards* violation harmless by isolating three aspects of the State's case, namely, Potenzo's testimony for the State, the petitioner's presence at the scene, and the petitioner's possession of the bag of money, and did so without any regard to the defense. However, as noted, the petitioner's testimony flatly contradicted Potenzo's, who admittedly testified against the petitioner to avoid the death penalty. The petitioner's presence at the scene was an undisputed issue and consistent with his defense that he was there on a plumbing job without knowledge of Potenzo's plan to rob. Also, the petitioner's possession of the bag of money was explained as an event which took place after Potenzo committed the crimes.

Although less onerous to the prosecution than the "harmless beyond a reasonable doubt" standard of *Chapman*, the *Brecht* standard is nevertheless "demanding." See *Brecht*, 507 U.S. at 641, 113 S.Ct. at 1723 (Stevens, J., concurring). Consequently, it is only when a judge is "'sure that the error did not influence the jury, or had but very slight effect'" that an error should be deemed harmless under *Brecht*. *O'Neal v. McAninch*, 513 U.S. 432, 437, 115 S.Ct. 992, 995, 130 L.Ed.2d 947 (1995) (quoting *Kotteakos*, 328 U.S. at 764, 66 S.Ct. at 1248).

Here, the district judge erroneously applied *Brecht* by considering only portions of the State's case without any regard to the defense or the impact of the challenged statements. This is precisely what this Court instructed the courts not to do. See *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248 ("The inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."). In this case, the prosecution turned almost entirely upon the credibility of its star witness, Potenzo, who possessed motives for falsely testifying against the petitioner and whose critical testimony as to the petitioner's purported knowledge was uncorroborated save by one of the challenged statements. Without the error of the admission of the challenged statements, the jurors were left to decide between the credibility of Potenzo and the petitioner. Under such facts, the error cannot be deemed harmless. See *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248 (if the court cannot conclude "that the judgment was not substantially swayed by the error," the error is harmful.).

Review is sought to resolve the conflict with *Brecht* and *Kotteakos*.

III.

A VIOLATION OF *EDWARDS v. ARIZONA* IS NOT HARMLESS *PER SE* UNDER *HARRIS v. NEW YORK.*

The district judge ruled that assuming the petitioner's statements were "taken in violation of *Edwards v. Arizona*, [they] were also admissible to impeach [the petitioner pursuant to] *Harris v. New York.*" (App. 25). The court of appeals approved the ruling.

The ruling assumes that the petitioner would have taken the witness stand even if his statements had been suppressed or, in the event of retrial and suppression, the petitioner would again take the witness stand. The ruling is erroneous for several reasons. First, it is pure speculation that the petitioner would so testify. Second, it is the prosecution who bears the burden of proving that its illegal introduction of the petitioner's statements did not induce his testimony at his trial. See *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). The State made no such showing in the record. Finally, the ruling effectively overrules *Edwards* by rendering harmless *per se* any violation thereof through a potential application of *Harris*.

For any or all of these reasons, this Court is requested to grant review.

IV.

A STATE PRISONER, WHO PRESENTED THE STATE COURTS WITH THE CLAIM THAT HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BECAUSE THE PERFORMANCE OF TRIAL COUNSEL WAS IMPAIRED BY AN INVESTIGATION INTO TRIAL COUNSEL'S ALLEGED CRIMINAL CONDUCT BY THE SAME PROSECUTOR WHO BROUGHT THE CHARGES AGAINST THE PRISONER, IS NOT BARRED FROM SEEKING FEDERAL HABEAS CORPUS RELIEF FOR DENIAL OF HIS SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL ON THE GROUND THAT HE WAS REQUIRED TO PRESENT THE STATE COURTS WITH A SEPARATE SIXTH AMENDMENT CLAIM ALLEGING SPECIFICALLY THAT HIS COUNSEL LABORED UNDER A CONFLICT OF INTEREST.

In the state courts, the petitioner unsuccessfully claimed he was denied effective assistance of counsel in violation of the Sixth Amendment. The petitioner argued, *inter alia,* that his counsel's performance was impaired due to an investigation by the same prosecutor who brought the charges against the petitioner. The petitioner pointed to specific instances of his counsel's ineffectiveness, including counsel's failure to interview or present to the jury a witness to whom the prosecution's star witness had recanted his accusations against the petitioner. The petitioner sought federal habeas corpus relief but the district court ruled that the petitioner's Sixth Amendment ineffective assistance of counsel claims in the state courts failed to exhaust the claim that he was denied his

Sixth Amendment right to conflict-free counsel.[1] The district judge, citing as its only authority an unpublished decision of the Ninth Circuit, ruled that a claim of the denial of the Sixth Amendment right to conflict-free counsel must be presented to the state courts, for the purposes of exhaustion, separately from a claim of denial of the Sixth Amendment right to effective assistance of counsel.[2] The court of appeals affirmed on the ground that the district court had rendered a "well-reasoned Order...". (App.1).

In *Strickland*, this Court held that a defendant suffers ineffective assistance of counsel in violation of the Sixth

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[1]In *Ex Parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), this Court first announced the exhaustion requirement by holding that in order to obtain federal habeas corpus relief, a state prisoner must first exhaust his remedies in state court by giving the state courts an opportunity to act upon his claims. The exhaustion requirement is codified at 28 U.S.C. §2254. (b)(1).

[2]The district judge reasoned as follows:

> [The petitioner] referenced the conflict of interest claim only as part of his argument that Sheaffer [the petitioner's trial counsel] did not properly investigate the case and failed to call witnesses at trial. By failing to raise the conflict of interest claim as a separate issue under *Cuyler [v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)] or *Strickland [v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], [the petitioner] deprived the trial court of the opportunity to ascertain the extent of the investigation of Sheaffer, whether the investigation created an actual conflict of interest between Sheaffer and [petitioner], and whether the actual conflict of interest, if one existed, adversely affected Sheaffer's performance. See, *e.g.*, *Bergman v. Duncan*, 86 F.3d 1161 (9th Cir.1996) [unpublished] (text found at 1996 WL 272546) (conflict of interest is an issue that must be raised separately from a general ineffective assistance of counsel claim).

(App. 18).

Amendment if his attorney has (1) a potential conflict of interest and the defendant proves prejudice, or (2) an actual conflict of interest, in which case prejudice is presumed and the defendant need only show the conflict adversely affected counsel's performance. As long ago as *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), this Court recognized that the right to conflict-free assistance of counsel is a component of the Sixth Amendment right to effective assistance of counsel. More recently, in *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), this Court stated: "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to [illegible]sentation that is free from conflicts of interest." *Wood*, 450 U.S. at 271, 101 S.Ct. at 1104 (citing *Cuyler* and *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)).

In this case, it is true that the petitioner did not invoke the term "conflict of interest" in the state courts. But this Court has held that to "fairly present" a claim, petitioners need only present their issues to the state courts in such a manner that they are "alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). See also *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The exhaustion rule, which is not a jurisdictional requirement, *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), does not require that a petitioner cite to the state courts "book and verse" of the federal constitution to satisfy the exhaustion requirement. *Picard*, 404 U.S. at 277, 92 S.Ct. at 509.

The claim presented by the petitioner to the state courts fairly alerted them that he was invoking his Sixth Amendment right to conflict-free counsel. For example, the petitioner made the following arguments to the state trial judge in the post-conviction attack upon the effectiveness of his trial counsel:

> During the course of the trial in this matter, many unusual and irregular events occurred which may have impaired trial counsel's ability to perform effectively. State Attorney Sharpe initiated a proceeding to determine whether William Sheaffer and his investigator had offered a witness money in return for favorable testimony. Certainly, the attempt by the Assistant State Attorney to have Mr. Sheaffer removed as trial counsel on allegations of misconduct, created an atmosphere in which anyone would have difficulty performing.

(App. 52).

> Mr. Sheaffer was under investigation himself for possible bribery of a witness. Mr. Sheaffer was told that he should get out of the case by the very prosecutor in this case. He may not have been functioning well at all.
>
> ***
>
> [Sheaffer] was ... under the ... trauma of the investigation. [H]e was very concerned about his entire relationship with witnesses.

(App. 66-67).

> [T]he reason[] this case is so singular is that Mr. Sheaffer was himself under investigation during the most critical period of the case, immediately before ... trial and ... Mr. Sheaffer was required under his own assumption of what had to be done to hire a lawyer ... from Miami to say that [he] was not embroiled in his own defense, to say on the witness stand, "I wasn't really concerned about it," I think is really something that we cannot accept and I would

> ask Your Honor, as the trier of fact of this hearing, to take into consideration whether it was considered de minimis, so to speak, by this lawyer.

(App. 67).

> [Sheaffer] conceded that he ... had been under investigation and fortunately for him it did not result in an indictment. The very time he [Sheaffer] was representing my client who was then his client, he was certainly, very, very distracted, Your Honor.
>
> ***
>
> Mr. Sheaffer, I submit to you, Your Honor, unfortunately fell down on the job here, but not because of some strategic judgment which would be perfectly okay under the cases, [but] because of the fact he did not and could not represent the defendant the way he should have been.

(App. 67-68).

In the state appellate court on appeal from the denial of his post-conviction attack, the petitioner argued in his brief that the prosecutor's criminal investigation of Sheaffer "undoubtedly affected [Sheaffer's] ability to function effectively during the course of preparing [petitioner's] case." (App.68). The petitioner further argued in his brief as follows:

> It is clear from the record that just prior to the information pertaining to [the witness] coming to Sheaffer's attention, Sheaffer was forced to defend himself against allegations of criminal impropriety made by [the] Assistant State Attorney [who] initiated a proceeding aimed at

> having Sheaffer removed as [petitioner's] counsel. The allegation was that Sheaffer and his investigator had offered money to a witness in return for favorable testimony. Sheaffer defended himself with help from the National Association of Criminal Defense Lawyers. This action against Sheaffer created an atmosphere in which any person would have had difficulty performing. At a minimum, it certainly had a chilling effect on Sheaffer's initiative to interview another potential witness.....

(App. 68-69).

In sum, the Ninth Circuit in *Bergman*, and now the Eleventh Circuit in the case at bar, hold that a habeas petitioner who presented to the state courts a conflict of interest claim as part of a claim of ineffective assistance of counsel under the Sixth Amendment has failed to exhaust state remedies. As noted, this view conflicts with this Court's jurisprudence regarding both the Sixth Amendment and exhaustion. This Court is requested to grant review to resolve the conflict.

V.

AN ACTUAL CONFLICT OF INTEREST ARISES WHEN AN ATTORNEY IS BEING INVESTIGATED BY THE SAME PROSECUTOR WHO IS PROSECUTING THE ATTORNEY'S CLIENT AND THE CLIENT'S MERE KNOWLEDGE OF THE INVESTIGATION DOES NOT CONSTITUTE A WAIVER OF THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL.

A.

There is a split of authority regarding the burden upon a defendant who alleges that he was denied his Sixth Amendment right to conflict-free counsel on the ground that his counsel was under investigation by the prosecution. As noted, *Strickland* held that a defendant suffers ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest and the defendant proves prejudice, or (2) an actual conflict of interest, in which case prejudice is presumed and the defendant need only show the conflict adversely affected counsel's performance. The circuits are split over what burden a defendant bears for relief when his counsel was under investigation by the same prosecutor who brought the charges against the defendant.

In *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987), the defendant's counsel was under investigation by the same United States attorney's office prosecuting the defendant. Certain assistant United States attorneys suggested to the defendant's counsel that his own indictment could be delayed until after the completion of the defendant's trial. The Eleventh Circuit found an actual conflict of interest. Specifically, the court held that because it was in counsel's best interest to have a lengthy trial, he could not have adequately represented his client in exploring possible plea negotiations.

In *United States v. White*, 706 F.2d 506 (5th Cir.1983), counsel was under investigation by a grand jury regarding his participation in his client's escape from jail. The Fifth Circuit found that these circumstances created an actual conflict of interest and reversed based upon the defendant's invalid waiver of the conflict.

In *United States v. Montana*, 199 F.3d 947 (7th Cir.1999), the court of appeals expressly disagreed with *McLain*, holding instead that the defendant is required to prove that his counsel operated under "actual fear of retaliation". *Id.* at 949.

Review is sought to resolve the conflict among the circuits.

B.

In the case at bar, the district court ruled that because the petitioner had notice of the allegations against his counsel, the rule of *McLain* did not apply. (DC at n.2). In its affirmance, the court of appeals approved the reasoning of the district court.

The conclusion reached by the district court would only be true if the notice to the petitioner constituted a waiver of his right to conflict-free counsel. However, a waiver cannot be established through presumed acquiescence. See *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), overruled on other grounds by *Edwards*. There is no knowing and intelligent waiver by the petitioner of his Sixth Amendment right to conflict-free counsel. As noted, no judicial inquiry whatsoever was conducted of the petitioner. Moreover, the law governing waiver is such that even if the petitioner had voiced approval of his counsel, which he did not, that would not have sufficed for a finding of a waiver. Cf. *United States v. Cronic*, 466 U.S. 648, 657 n.21, 104 S.Ct. 2039, 2046 n.21, 80 L.Ed.2d 657 (1984) ("If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. It is for this reason that

we attach no weight to ... respondent's expression of satisfaction with counsel's performance at the time of trial...."). Review is sought to resolve the issue of waiver.

VI.

A TRIAL COURT'S DUTY TO INITIATE AN INQUIRY INTO A CONFLICT OF INTEREST ARISES WHEN THE COURT IS PLACED ON NOTICE THAT COUNSEL FOR AN ACCUSED IS BEING INVESTIGATED BY THE SAME PROSECUTOR WHO BROUGHT THE CHARGES AGAINST COUNSEL'S CLIENT.

Where a trial judge is sufficiently apprised of the mere possibility of a conflict of interest, the judge has a duty to conduct an inquiry to determine whether counsel is operating under an actual conflict, potential conflict, or no conflict at all. See *Wood*, 450 U.S. at 272-73, 101 S.Ct. at 1103-04; *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178-79. The trial court's obligation arises from the "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment." *Wheat v. United States*, 486 U.S. 153, 161, 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140 (1988). When a possible conflict has been ignored, reversal is automatic. *Wood*, 450 U.S. at 273 n.18, 101 S.Ct. at 1097 n.18; *Cuyler*, 446 U.S. at 347, 100 S.Ct. at 1717-18; *Holloway*, 435 U.S. at 488, 98 S.Ct. at 1180-81.

In this case, an important question for resolution by this Court is whether the trial court's duty to initiate such an inquiry arises when the court is placed on notice that counsel for an accused is being investigated by the same prosecutor who brought the charges against counsel's client.

In *Wood*, this Court found that "the fact that the State raised the conflict problem explicitly and requested that the court look into it" placed the trial judge on notice of the need

for an inquiry. *Id.*, at 273, 101 S.Ct. at 1104. Similarly here, the State filed a motion to disqualify the petitioner's trial counsel on the ground that he was being investigated for bribery of a prosecution witness and that he might be called as a witness in the petitioner's trial.

Here, as in *Wood,* the trial judge was alerted to the conflict by the State's motion to disqualify and was therefore obligated to conduct an inquiry of the petitioner into the conflict. However, no such inquiry took place. Review is sought to resolve this important issue.

Respectfully submitted,

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